HARVARD
LAW REVIEW

VOL. XXXV MAY, 1922 NO. 7

THE JUDICIAL POWER[1]

THE great and sound principle that all governmental power should be separated into executive, legislative and judicial powers,[2] like all other great and sound principles, calls for a practical test occasionally so that we may see what it is and what is left of it. Convenience and practical considerations have an erosive effect upon dogma and theory. The old-time orthodox safeguards of liberty have sometimes been let down under the stress of occasions and causes and in the name of efficient government. We have been reminded that "government is a practical institution adapted to the practical conduct of public affairs."[3] On the other hand the charge has recently been made with much impressiveness by the New York State Judiciary Constitutional Convention of 1921, a body of judges, lawyers and legislators of unusual skill and experience, that "extensive legislative, executive and judicial powers are being vested and combined in administrative bodies in distinct and reckless disregard of the sound principle of the separation of governmental powers, which was deemed so essential to the true protection of individual rights by the wise founders of our republi-

[1] With diffidence and with full knowledge of the limitations on my ability to state either what the fundamental law of New York is, or what the results of a change in the law may be, the suggestions contained in this article are presented, not *ex cathedra*, but as one lawyer speaking to others on a controverted question in order to widen the discussion rather than to end it. As Chancellor Kent said of his "Battery Opinions," they cost nothing and bind no one.

[2] Kilbourn *v.* Thompson, 103 U. S. 168, 190 (1880).

[3] Milwaukee Pub. Co. *v.* Burleson, 255 U. S. 407, 416 (1921).

can form of state governments." [4] The great learning and unselfish public spirit of Mr. William D. Guthrie, who as chairman of the executive committee drafted the Report, assure us that many of our most intelligent and highly educated citizens regard this tendency as "the great misfortune of the day." [5] The inquiry is timely as to what extent the principle of distribution of powers obtains as a part of our constitutional law and to what extent it is being disregarded.

The theory that the powers of government should be divided into the three classes indicated, to the end that in state and nation we may live under a government of laws rather than of men,[6] is confidently said to have been suggested by Aristotle, developed by Montesquieu and adopted wherever constitutional governments are found.[7] The maxim that the protection of the rights of persons from the evils of despotic forms of government requires the complete separation of governmental powers is, however, applied practically to our institutions only in a limited sense. In its entirety it is at once a seeming paradox and a manifest truism; the perfection of our constitutional system and law taken for granted. Rights rest for their substantial basis on the guarantees of life, liberty and property. The protection of rights causes the division of powers; the division does not create the rights. The separation of powers provides the formidable sanction and the useful working rule of convenience for the maintenance of rights, but it is coupled with all the checks and balances which have been devised to prevent any department of government from exercising its functions without interference from or responsibility to the other departments.[8]

First. Political power in a free government rests in the law-making body. All functions and duties of constitutional government there remain until they are otherwise distributed. The objection that a state statute confers upon executive or ministerial

[4] Report to New York Legislature of Judiciary Constitutional Convention of 1921, Legislative Document (1922) No. 37, p. 11.

[5] Dissenting opinion of Cullen, C. J., Matter of Hopper *v.* Britt, 204 N. Y. 524, 534, 98 N. E. 86 (1912).

[6] Massachusetts Constitution.

[7] BLACK, CONSTITUTIONAL LAW, 3 ed., § 51.

[8] "The usual checks and balances of republican government, in which consists its chief exellence." COOLEY, CONSTIT. LIM., 7. ed., p. 64.

officers powers of a judicial nature presents no question under the Federal Constitution. The threefold distribution of powers is, generally speaking, a necessary incident neither of a republican form of government nor of due process of law.[9]

Secondly. Some mingling of such powers is more essential to good government than is a doctrinaire separation of them.

"When we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the *whole power* of one of these departments should not be exercised by the same hands which possess the *whole power* of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution." . . . "Indeed, there is not a single constitution of any State in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it."[10]

The virtue of the rule lies more in the independence in a general way of the powers one of the other, so that one is not dependent upon nor the creature of another, than in their complete separation.

Thirdly. A categorical distinction between legislative and executive and judicial powers cannot in all cases satisfactorily be made. What powers are so inherently legislative or executive or judicial as to preclude their delegation in any degree to another branch of the government? Only the broadest terms may be used with safety in answering the question.[11] The legislative power is

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[9] "The Federal constitution does not inhibit the blending by the States of the powers of two, or even of all three of the great departments of government in the hands of a single officer or a single official body." Prentis *v.* Atlantic Coast Line, 211 U. S. 210, 213 (1908); Dreyer *v.* Illinois, 187 U. S. 71, 83 (1902); Village of Saratoga Springs *v.* Saratoga G., etc., 191 N. Y. 123, 83 N. E. 693 (1908).

[10] STORY, CONSTITUTION, 5 ed., 393, 395.

[11] "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." Holmes, J., in Prentis *v.* Atlantic Coast Line, 211 U. S. 210, 226 (1908). Lemke *v.* Homer Farmers' Elevator Co., 42 Sup. Ct. Rep. 250 (1922).

the supreme law-making power, but it may delegate certain of its regulative powers to administrative boards appointed by the executive; the judiciary also legislates "incidentally and in a subsidiary way" [12] under the formula of declaring what the law is and forever has been; the executive power enforces the laws, not as a sheriff or a constable does, but as a power that makes rules and orders, both legislative and *quasi*-judicial in character, without which the law-making power would often be ineffective;[13] the judicial power not only interprets and applies the law in controversies between parties, but also makes rules of practice and appoints officers to administer vast undertakings.

Fourthly. Notwithstanding the fact that a state may in a limited sense unite legislative and judicial power in the same body, a state without independent courts is a practical everyday impossibility. As we adopt the theory that the constitutions are the supreme law, so judicial power as a check on usurped or arbitrary power must exist in courts. Legislative law must be measured by the standard of the constitutions. England makes the remedy for unconstitutional action exclusively political, but England finds in tradition and custom the check on bad laws which America largely confides to the courts. Even in England, Sir H. H. Cozens-Hardy, Master of the Rolls, is quoted as saying in a speech at the annual dinner of the Fishmongers Company to the Bench and Bar that government by departments by administrative action was "a very bad symptom . . . attended with very great danger"; that it had been and he hoped it always would be the duty of the courts of justice to see as far as possible that the powers entrusted to the other departments of government should be exercised reasonably and to offer the extremest resistance in their power to encroachment by the executive.[14] The protection of individuals from the arbitrary, capricious and unauthorized exercise of power is an essential attribute of free government. The court may not substitute its own judgment for that of the legislature or the administrative board in determining what is fair and reasonable, but it will probably overturn any action, legislative or executive, when clearly of the opinion that such

[12] THAYER'S PRELIMINARY TREATISE, p. 319.

[13] Buttfield *v.* Stranahan, 192 U. S. 470 (1904); Bates & Guild Co. *v.* Payne, 194 U. S. 106 (1904).

[14] 131 THE LAW TIMES, 22, May 6, 1911.

action is fundamentally or constitutionally wrong, arbitrary, capricious or unauthorized. At least the circumstance that the question is not within the purview of judicial power will be the sole deterrent of judicial relief.[15] Under the Federal Constitution, it has been held that state courts must be given power and a fair opportunity to determine the question of confiscation according to their own independent judgment on the law and the facts when state action, legislative in its character, such as rate regulation by a board, threatens to take property without due process of law. So long as New York has constitutional courts, the Federal Constitution, not the separation of powers merely, prevents legislative power from determining the conclusiveness of its own decisions on such questions. "Due process" implies an independent court, not an executive or legislative board, with power to pass on the constitutionality of such determinations.[16]

If we are to have governmental regulation of public utilities and other corporations, from the nature of things public service commissions, interstate commerce commissions and the like are an indispensable adjunct to such regulation. Grave questions of fact must be tried out before them and on controverted questions arising out of the weight of evidence, judicial review would often be an endless and fruitless task. The legislature cannot and the courts should not be burdened with plenary regulative functions. Absolute and unreviewable legislative power over persons and property has no place in our system of government, but if the legislature itself might make the same determination on the facts presented in each case and might pass a constitutional law to cover them, what then remains for judicial review, however absolute the division of governmental power may be? The problem becomes one of politics, not of law; of men, not of measures.

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[15] People *ex rel.* New York & Queens Gas Co. *v.* McCall, 219 N. Y. 84, 113 N. E. 795 (1916); affirmed 245 U. S. 345 (1917). "Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, *although they may have the power, and will occasionally exercise the right of so doing.*" Brown, J., in Bates & Guild Co. *v.* Payne, 194 U. S. 106, 109 (1904).

[16] Ohio Valley Co. *v.* Ben Avon Borough, 253 U. S. 287, 289 (1920).

The criticism on administrative boards which exercise legislative powers, such as rate making, has been stated with force and, it is to be feared, with some degree of justice in the report to the Legislature of the Judiciary Constitutional Convention of 1921, above referred to. The charges thus made against them are in brief that not infrequently they are partisan, untrained and arbitrary; that they act not with "the cold indifference of an impartial judge," but to carry out a declared purpose; that they are an annex to the executive. They are declared to be "frequently utterly ignorant of the most elementary principles of justice"; to decide before hearing the merits of the controversy; to be like the justice of the peace who said at the close of the evidence that he would take the four days allowed by the Code before making the customary decision for the plaintiff. On the other hand it is said that the record of the state judiciary is commendable and generally satisfactory and that the judges as a class have been "scholarly, competent, industrious, impartial and incorruptible."

Although such a sweeping condemnation probably does injustice to individuals whose integrity and ability cannot be questioned, so long as such boards, commissions and bureaus are closely connected with the executive, concerned in carrying out its policies and subject to constant legislative interference, we may expect to find in their determinations the faults and weaknesses thus indicated, coupled with the advantages, either theoretical or practical, of expert knowledge and prompt and efficient action. But their functions are legislative rather than judicial and the courts may not do what they undertake to do, *i.e.*, fix a rate or make a service regulation. The extent of judicial power in such cases is to decide whether the board had or had not the legislative power it sought to exercise.[17]

The New York Constitution, says the Report, opens the door of danger to the evil of vesting judicial power in executive bureaus. A peculiarity of the New York Constitution is that, while the legislative power is vested in the legislature and the executive power is vested in a governor, the judicial power is not, as in the United

[17] Lake Erie & Western R. R. Co. *v.* State Public Utilities Comm., 249 U. S. 422, 424 (1919).

States Constitution, Article three, section one, in terms vested in the courts. A system of constitutional courts is, however, created and vested with judicial powers.[18] This difference has not as yet developed any radical distinction of opinion between state and federal courts on the location of judicial power. The reason for the omission expressly to locate judicial power in the New York courts is in a measure historical. At the time the state of New York ratified the Federal Constitution, its inhabitants were living under a constitution by which the court of last resort, called the Court for the Correction of Errors, was composed of twenty-four (afterwards thirty-two) members of the senate (the upper house of the legislature), the chancellor and the three judges of the Supreme Court, while the appointment of every officer in the executive government of the state, including local officers, with the exception of a few named in the constitution, was vested in the council of appointment composed of one senator from each of the four senatorial districts into which the state was divided. The council of appointment continued until 1821, when it was abolished by the new constitution of that year, but the Court of Errors remained the court of last resort until the Constitution of 1846, and the Senate still sits with the Court of Appeals as the court for the trial of impeachments.

The state government did not first become free in 1846, the theory of Aristotle, Montesquieu and the philosophers to the contrary notwithstanding. It became less centralized and more democratic and powers were distributed for that reason. Nor is the reason historical only. All judicial power, as distinguished from legislative and executive power, cannot be and has not been vested exclusively in the courts. Either we must say plainly that by the practice at common law and the practice in this country it may be in some part distributed elsewhere or we must introduce nice

[18] The New York State Constitution in Article III provides that "The legislative power of this State shall be vested in the Senate and Assembly." Article IV provides that "The executive power shall be vested in a governor, who shall hold his office for two years." Article VI provides merely for a supreme court having general original jurisdiction in law and equity, an appellate division with power of review of the law and the facts, a court of appeals to review questions of law, and local courts. While judicial power is not expressly vested in these courts, the power of the legislature over them is limited and no judicial power is expressly vested elsewhere.

distinctions between judicial and *quasi*-judicial power wherever facts are decided and law is declared judicially.[19]

The amendment [20] proposed by the Convention to meet the difficulty definitely vests for the first time judicial power in the New York courts. This feature is stressed in the Report as one of supreme importance. It might, no doubt, prevent in a measure the attempted exercise of unlimited power to preclude judicial review of legislative action, such as rate fixing, by an administrative board. Dormant rights are revived, uncurbed legislation is checked, eyes are opened, the indifference of the general public to the preservation in their integrity of the principles of free government is shaken off, the judges are reminded to keep jealous hold of their portion of power by discussions such as are contained in the Report. That the argument is not all against the commission system and that the commissions are not all biased for or against the corporations makes the discussion more valuable. One cannot foresee what the change will accomplish or whether it will accomplish anything. If one ventures to assert what a court or a judge will decide in the future on a novel question, after argument and in a new environment, one speculates on mental processes rather than on the operation of natural laws, and seeks to say that which the court or the judge does not know. The state courts may refuse to be controlled in their construction of the state constitution by the decisions of the Supreme Court of the United States construing the corresponding provisions of the Federal Constitution.[21]

It would seem, however, that the great safeguard against the exercise of arbitrary power by the state legislatures will be found not so much in a clearly outlined separation of governmental powers as in the state Bill of Rights and the Fourteenth Amendment. The orders of administrative boards should be in accordance with the state and federal constitutions; within the powers delegated

[19] People *ex rel.* Dawley *v.* Wilson, 232 N. Y. 12 (1921); Crane *v.* Hahlo 42 Sup. Ct. Rep. 214 (1922).

[20] Article VI, section 1. The judicial power of the state shall be vested in the courts which are in this article expressly continued and established and in such inferior local courts as now or hereafter may exist under and by virtue of the provisions of this article.

[21] Ives *v.* S. Buffalo Ry. Co., 201 N. Y. 271, 317, 94 N. E. 431 (1911); People *v.* Adams, 176 N. Y. 351, 68 N. E. 636 (1903).

to such boards; resting on law and evidence; and — considering the interests both of the public and the corporations or persons regulated — not arbitrary but reasonable, discreet and judicious. The courts could not, under the pretext of exercising judicial powers, consistently with the decisions of the Supreme Court of the United States, set aside orders lawfully made, for nothing is more elementary than that power to make such orders may be given to such boards even when judicial power is expressly vested in the courts, as it is under the Federal Constitution. The right of the legislature to delegate such order-making power seems now to be as inherent to government as the right to trial by jury or the writ of *habeas corpus*.[22] The Supreme Court of the United States may, in the absence of fraud or manifest mistake, as a matter of efficient government and sound public policy, decline to make the determinations of commissioners and other officers of an administrative character on questions of fact the subject of judicial review, but it does not hesitate to exercise judicial power to keep legislative and executive power in its proper place.[23] We might expect the state courts to follow in the main the same line of reasoning that the Supreme Court has adopted on these problems.

At least under the Federal Constitution, for fundamental purposes, to compel the due observance of the rights thereby guaranteed, free and independent judicial power must exist somewhere in the state system. Courts cannot be made the tame cats either of the executive or the legislative power except as they themselves yearn for a warm place by the fire. If the judges, "the inheritors of great traditions," have seemed at times, abruptly or by imperceptible degrees to abdicate some measure of their functions, the fault, if it is a fault, rests not on the phraseology of a particular constitution but rather on the construction which the final interpreters of the law have put on the ordinary constitutional rights of person and property. In their cautious reluctance to push such

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[22] I. C. C. *v.* Ill. Cent. R. R., 215 U. S. 452 (1910); United States *v.* Louisville R. R. Co., 235 U. S. 314 (1914).

[23] Marbury *v.* Madison, 1 Cranch (U. S.) 137 (1803). Newton, Atty. Gen. *v.* Consolidated Gas Co., 42 Sup. Ct. Rep. 264, (1922). See also the comprehensive article on "Judicial Review of Administrative Action by the Federal Supreme Court," by E. F. Albertsworth, 35 HARV. L. REV. 127.

rights to a stubbornly literal conclusion in the interests of an extreme individualism the courts have frequently demonstrated that they are not automata, playing the game with mere mechanical skill and accuracy. Independent judgment as an organ of the judicial mind is not wholly atrophied, however reluctant its possessors are at times to exercise it.[24]

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[24] The proposed New York judiciary article creates additional constitutional courts discarding, as the Massachusetts Commission did, the suggestion that courts should be unified. The New York Report says on this subject: "The judicial system of the state of New York had proved reasonably successful and satisfactory as a whole in practical experience." (Report, p. 7.) The Massachusetts Report said: "We are not prepared to recommend this simplified organization at the present time. In the first place, we are by no means sure that, if it were adopted, it would work out in actual practice as well as it might appear on theoretical consideration. In the next place, we are inclined to think that the community is not at present ready for it." (Second and final Report of the Massachusetts Judiciary Commission, 1921, p. 25.)